10 Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

KATHLEEN A. LEAHY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

Whether an employee may file a mixed-case appeal with the Merit Systems Protection Board ("Board") either after the case is dismissed without prejudice or after filing a district court complaint for discrimination for the same agency action, and is the "election of remedies" regulation relied upon by the Board violative of Congressional intent to promote Federal employee rights under both Title VII and the C.S.R.A.

Whether an employment discrimination plaintiff has the right to simultaneously pursue a civil action while also pursing an appeal before the Board concerning the same matter.

Whether a Federal employee can maintain a MSPB appeal and a Title VII complaint for the same agency action, and, if so, under what circumstances.

Whether the Board's dismissal of an appeal without prejudice in order to circumvent the requirement that an appeal must be adjudicated within the Board's 120-day time limit comports with Congressional intent to expeditiously adjudicate an MSPB appeal within 120-days.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Federal Circuit Court of Appeals in this case.

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The Federal Circuit opinion (App. A) is reported at *Leahy v. Merit Systems Protection Board*, 99-3144, 2000 U.S. App. LEXIS 31755.

STATEMENT OF JURISDICTION

The judgment of the Federal Circuit Court of Appeals was entered on December 11, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right to judicial review of an administrative action involving discrimination allegations is contained in 5 U.S.C. Section 7702(e)(1)(A)(B) and (C).

A mixed case appeal alleges that an agency action appealable to the Board was effected, in whole or part, because of employment discrimination. 29 C.F.R. Section 1614.302(a).

STATEMENT OF THE CASE

On October 7, 1997 Petitioner was removed from the position of Civilian Protocol Officer with the Army. On November 7, 1997, the Petitioner initially filed an appeal of her removal to the Merit Systems Protection Board ("Board"). On February 3, 1998, after receipt of Petitioner's late filed request for discovery due to the recent appointment of counsel, the Board dismissed the appeal without prejudice to allow the parties to complete discovery and prepare for hearing. Petitioner was instructed that the appeal would have to be refiled no later than 90 calender days from the date of this decision, but not sooner than 45 days from the date of this decision.

Prior to refiling the appeal with the Board, however, the Petitioner filed a complaint in district court under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. At the time of the filing of her complaint in district court, there was no judicially reviewable action by the 120th day after she had filed her mixed-case appeal with the Board. In that civil action, Petitioner sought review of her removal, as well as other matters which would have been the subject of an Equal Employment Opportunity (EEO) complaint. Then, on May 1, 1998 Petitioner timely refiled her appeal with the Board.

The administrative judge dismissed the refiled appeal for lack of jurisdiction. Leahy v. Dep't of Army, No. AT-0752-98-0126-I-2 (M.S.P.B. Aug. 10 1998). (App. C) That initial decision became final on January 19, 1999 when the Board denied Petitioner's petition for review. (App. B)

On December 11, 2000, the United States Court of Appeals for the Federal Circuit affirmed the administrative judge's dismissal of the refiled appeal for lack of jurisdiction. (App. A).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT CONFLICTS WITH OTHER CIRCUITS

Although the Federal Circuit has statutory authority to review jurisdiction for non-discrimination based cases, the issue before this Court is one of a continuing nature; all discriminatory claims must be brought before the appropriate district court and, thus, comes before all Circuit Courts of Appeals. Therefore, the conflict among the Court of Appeals needs to be resolved as the issue presented is of national importance, affecting all Federal Employees.

On one hand, and at one extreme, the Federal Circuit has affirmed a finding that "for purposes of consistency of processing concerning issues of discrimination law, the Board should follow the EEOC's practice and similarly defer adjudication to the district court when an appellant elects to file a district court suit pursuant to 5 U.S.C. Section 7702(e)(1)(B)." On the other hand, and at the other extreme, the District of Columbia Circuit has held:

> While the district court has jurisdiction over such a claim . . .we see no reason why the district court cannot stay the case, or hold it in abeyance, for a reasonable period of time. *See National Treasury Employees Union*, 961 F.2d at 245 (reversing dismissal for failure to exhaust administrative remedies but directing the district court to hold claim in abeyance for three months to allow the FLRA time to hear unfair labor practice claim). Such treatment would allow the court to benefit from the

> exercise of the MSPB expertise, preserving judicial resources while simultaneously protecting the right of appeal contained in section 7702(e)(1)(B). . . While this delay may not be typical, it reveals that the district courts can routinely benefit from MSPB expertise without running afoul of the unambiguous language of section 7702(e)(1)(B), and without disadvantaging parties who follow the letter of the statute's time line.

Butler v. West (1999) 334 U.S.App.D.C.55; 164 F.3d 634, 643.

In the instant case, on November 7, 1997, Petitioner filed an appeal of her removal to the Merit Systems Protection Board ("Board"). On February 3, 1998, the Administrative Board Judge hearing this appeal dismissed the appeal without prejudice. Dismissal without prejudice is a fiction created by the Board to allow for continuing an appeal beyond the 120 mandatory adjudication period. At that time, Petitioner was instructed that an the appeal would have to be refiled no sooner than 45 calendar days later and no later than 90 calendar days from the date of the Board's dismissal. A refiling does not entail submission of any documents or forms other than a one line letter indicating refiling. A refiling incorporates all previously submitted documents.

On March 23, 1998, 137 days after she lodged her mixed case appeal with the Board, Petitioner filed a complaint in the district court under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. **At the time Petitioner filed her civil action, there was no judicially reviewable action by the 120th day after she lodged her mixed case appeal with the Board.**

The test of 5 U.S.C. Section7702(e)(1)(B) provides that:

> Notwithstanding any other provision of law, if at any time after --
>
> > (B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section [providing mixed case appeals], there is no judicially reviewable action . . . ;
> >
> > an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 . . .

As the United States District Court of Appeals for the District of Columbia Circuit held in *Butler*:

> The unambiguous and explicit language of section 7702(e)(1)(B), as well as the basic design of the statute in which it reposes, limit our reading of "judicially reviewable action" to one subject to judicial review as of the time the plaintiff files suit.
>
> . . . [S]ection 7702(e)(1)(B) is situated with a larger statutory provision-section 7702 – that structures the path of all mixed cases. As a whole, section 7702 provides a rigid time line for advancing mixed cases through the various phases of administrative and judicial review

set forth therein.

> The legislative history lends further support to our reading of section 7702(e)(1)(B). The Joint Explanatory Statement of the Committee on Conference accompanying the CSRA ("Explanatory Statement") declares that the bill establishes mandatory time limits to govern the maximum length of time the employing agency, the MSPB, the EEOC, or the Panel may take to resolve the matter at each step in the process. The act makes compliance with these deadlines mandatory – not discretionary in order to assure the employee the right to have as expeditious a resolution of the matter as possible.

Butler at p. 640-1.

In the case, subjudice, the Federal Circuit affirmed the MSPB Judge who not only dismissed the Petitioner's MSPB hearing for lack of jurisdiction, but who went one step further.

> Even if [Petitioner's] appeal had not been dismissed without prejudice or if the appellant had filed the district court complaint after filing her appeal with the Board, I would find that the Board lacks jurisdiction over the appeal. I recognize that, in *McGovern v. Equal Employment Opportunity Commission*, 28 M.S.B.R. 689, 691 n.1 (1985), the Board held that it would not dismiss such an appeal for lack of jurisdiction. However... I find the reasoning behind the Board's decision in *McGovern* is no longer valid.

In so deciding, the MSPB Judge reasoned that at the time the Board issued its decision the EEOC's regulations were consistent with the Board's holding in that case.

However, that regulation [29 C.F.R. §1613.283] was changed effective October 30, 1987. The judge noted the current regulations demonstrate EEOC's practice of ceasing its processing of a complaint when a complainant elects to file a district court suit prior to a judicially reviewable action pursuant to 5 U.S.C. §7702(e)(1)(A) and (C). The Judge concluded that "EEOC's practice in terminating complaints where an employee subsequently chooses to file a district court suit is a practice the Board is similarly compelled to follow."

However, as the Board held in **McGovern**, there is no statutory requirement, or proscription that would mandate the Board to follow EEOC regulations. Moreover, even if the Board is compelled to follow EEOC regulations, the reasoning behind *McGovern* is still valid despite the changes in the EEOC regulations. Specifically, decisions issued subsequent to the aforementioned changes in the EEOC regulations have recognized the principle in *McGovern*. *See Connor v. United States Postal Service*, 15 F.3d 1063; 1994 U.S. App. LEXIS 1695 (Fed. Cir. 1994); *Williams v. EEOC*, 75 M.S.P.R. 144 (1997). As the Judge noted, 29 C.F.R. §1613.283 was changed effective October 30, 1987. However, *Connor* was decided subsequent to the said changes in 1994. *Connor* still recognized the principle in *McGovern*[1]. Thus, the reasoning behind *McGovern* is still valid despite the changes in the EEOC regulations, and the Board retains its jurisdiction over Petitioner's appeal despite her district court filing.

In the case at bar, the MSPB decision goes completely against current law. The judge ruled *Connor* was no longer good law. Yet, as late as 1997, in *Williams*, the MSPB used *Connor* to rule that filing can occur in both forums without incurring jurisdiction problems, as long as the filing occurs

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[1]In *Connor*, the Court distinguished the facts before it from *McGovern*.

first at the MSPB. Therefore, the correct law has not been applied under stare decisis. As *Connor* has never been overturned or overruled, the Federal Circuit ruled incorrectly when it upheld the Board's decision. *See also Hays v. Postmaster General*, 868 F.2d 328 (9th Cir. 1989)("Moreover, the regulations [29 C.F.R. Section 1613.403 (1988)] provide how the election of remedies is made: 'Whichever is filed first (the EEO complaint of the MSPB appeal) shall be considered and election to proceed in that forum'."); *Tolliver v. Deniro*, 790 F.2d 1394 (9th Cir. 1986) ("[S]o long as the petitioner had presented his discrimination claim to the MSPB and had not abandoned it, he did not have to appeal its dismissal until the MSPB proceedings on the other claims had also been completed.")

Therefore, as all discriminatory claims must be brought before the appropriate district court, and, thus comes before all Circuit Courts of Appeals, the current conflict among the Court of Appeals needs to be resolved as the issue presented is of national importance, affecting all Federal Employees.

II.

THE CONSTITUTIONALITY OF THE BOARD DISMISSING AN APPEAL WITHOUT PREJUDICE IN ORDER TO CIRCUMVENT THE REQUIREMENT THAT AN APPEAL MUST BE ADJUDICATED WITHIN THE BOARD'S 120-DAY TIME LIMIT MUST BE RESOLVED

When considering section 7702(e)(1)(B) within the larger statutory provision of section 7702 (providing a rigid time line for advancing mixed cases through the various phases of administrative and judicial review set forth

therein), coupled with congressional intent, the entire constitutionality of the Board's dismissal of Petitioner's appeal without prejudice is called into question.

The MSPB considers a dismissal without prejudice as a convenient mechanism to continue a case where the 120-day rule may apply. The Board holds that a dismissal without prejudice to refile lies within the MSPB Judge's discretion and becomes appropriate when it is in the interest of fairness, due process and conservation of resources of the parties. *Zell v. Dept. of the Army*, 57 M.S.P.R. 86, 88 (1993); *Smith v. Dept. of the Army*, 41 M.S.P.R. 110, 114 (1989). The MSPB also holds as follows:

> "there are no regulations specifically governing the dismissal of an appeal without prejudice . . . . Rather, dismissal without prejudice is a procedural option committed to the sound discretion of the administrative judge."

Keene v. Dept. of the Interior, 47 M.S.P.R. 41 (1991). The Board, in essence, created a vehicle to circumvent the 120 days rule where the parties need a prolonged continuance. *See Sheehan v. Dept. of the Army*, 43 M.S.P.R. 204 (1990) (dismissal without prejudice to continue discovery); *Gardner v. Dept. of the Treasury*, 68 M.S.P.R. 258 (1995) ("administrative judge has discretion to dismiss appeal without prejudice where an appeal cannot be fairly adjudicated within the Board's 120-day time limit"), *Neubeiser v. Federal Energy Regulatory Comm.*, 47 M.S.P.R. 125 (1991).

In *Biberstine v. DOD*, 37 M.S.P.R. 248 (1988) the Board actually questioned whether this vehicle was necessary in non-discrimination cases and was unclear as to discrimination cases. There, the Board stated:

To the extent that the Board has indicated in other cases that it will consider the 120-day adjudication policy as a reason for denying a continuance, . . . this Board rejects this principle as a factor for denying a requested continuance in a non-discrimination case. Although we need not resolve the question of whether the 120-day provision ... may be a factor in cases involving discrimination allegations, we note that such determinations must evolve from a balancing of all of the procedural entitlements . . .

The Board's dismissal of Petitioner's appeal without prejudice essentially allows the Board to create a fiction of dismissal when in fact no dismissal exists. Allowing such a fiction to continue sets a bad precedent for all Federal Administrative Agencies because it ignores Congress' intent. This fiction takes away federal rights of federal employees, and affects administrative processing as well.

In the instant matter, the Administrative Judge dismissed Petitioner's appeal without prejudice and allowed her to refile her appeal only because discovery could not be completed within the time frame and a decision could not be rendered timely. "[T]he Board dismissed the appeal without prejudice **to allow the parties to complete discovery and prepare for hearing.**" Clearly, the MSPB judge never contemplated that the case was actually dismissed or else discovery would have no basis in which to be conducted. It was only after this procedural dismissal that Petitioner chose to file her complaint in federal court.

It is clear that the Petitioner elected to file with the MSPB prior to filing her Title VII claim in district court. Thus, Petitioner elected to be before the Board and at no time did she ever choose to dispose of her MSPB appeal. Similarly, both the Board and the Agency anticipated that the Petitioner would continue her MSPB appeal. In essence, the MSPB Judge "continued" Petitioner's appeal by allowing a

dismissal without prejudice. Thus, under *McGovern* and *Williams*, the MSPB never lost its initial jurisdiction over the Petitioner's appeal because a dismissal without prejudice does not divest the Board of its jurisdiction.

The dismissal without prejudice fiction emphatically contradicts Congress' desire that mixed case appeals should proceed expeditiously. As the Court of Appeals for the District of Columbia Circuit stated in *Butler*:

> [S]ections 7702(a)(1) and 7702(a)(2) respectively direct that the MSPB and an employee's agency – depending on where the complainant chooses first to pursue his mixed case – "shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action", 5 U.S.C. Section 7702(a)(1), and "shall resolve such matter within 120 days." 5 U.S.C. Section 7702(a)(2). Moreover, sections 7702(e)(1)(A) and 7702(e)(1)(C) each allow aggrieved employees to pursue their claims in federal court when either employing agency of the EEOC has been temporarily remiss in processing a case before it. See 5 U.S.C. Sections 7702(e)(1)(A) & 7702(e)(1)(c). **Read together, these provisions clearly express Congress' desire that mixed cases should be processed expeditiously . . .** (emphasis added)

Butler at p. 640.

Therefore, Supreme Court should take this opportunity to resolve the constitutionality of the Board's dismissal of Petitioner's appeal without prejudice in order to circumvent the requirement that an appeal must be

adjudicated within the Board's 120-day time limit. Furthermore, the regulation creating the so-called EEOC "election of remedies" ruled upon by the Board, 29 CFR 1614.302, does not comport with Congressional intent and, thus, should be declared invalid by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

99-3144

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KATHLEEN A. LEAHY,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

December 11, 2000, Decided

JUDGES:
Before NEWMAN, Circuit Judge, PLAGER, Senior Circuit Judge, * and BRYSON, Circuit Judge.* Judge Plager assumed senior status on November 30, 2000.

OPINIONBY:
PLAGER

OPINION:

PLAGER, Senior Circuit Judge.

The issue in this case is whether the Merit Systems Protection Board (Board) had jurisdiction over Kathleen A. Leahy's mixed case appeal[1] of her removal from her position as a Protocol Specialist with the Army. The Board dismissed without prejudice Ms. Leahy's first appeal to the Board. Ms. Leahy later refiled her appeal with the Board, but only after

filing a discrimination complaint in federal district court seeking review of her removal, as well as other matters that had been the subject of an Equal Employment Opportunity (EEO) complaint and were not appealable to the Board. The administrative judge dismissed the refiled appeal for lack of jurisdiction. Leahy v. Dep't of the Army, No. AT-0752-98-0126-I-2 (M.S.P.B. Aug. 10. 1998) (initial decision). That decision became final on January 19, 1999 when the Board denied Ms. Leahy's petition for review. Because the filing of Leahy's discrimination complaint in federal district court precluded a later appeal to the Board of her removal, we affirm the Board's decision to dismiss for lack of jurisdiction.

Ms. Leahy contends that she may proceed simultaneously with a discrimination claim in district court and an appeal to the Board of her removal. We cannot agree. An employee who alleges that an agency action normally appealable to the Board is related to employment discrimination has several paths via which to pursue her mixed case. At various points along the way, the employee may have a choice between two forums. For example, an employee who has been removed, and who believes the removal was motivated by prohibited agency conduct, initially may file a complaint for discrimination with the agency or may file an appeal of the removal with the Board, but not both. *5 U.S.C. § 7702*(a)(1); 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b). In some scenarios, an employee may file a district court action for discrimination after she has filed an appeal of the removal with the Board. See *5 U.S.C. § 7702*(e)(1)(B) (employee may file a discrimination action in district court if the Board has not issued a final decision in a pending mixed case appeal within 120 days of the date the appeal was filed); 29 C.F.R. § 1614.310(h) (same); see also *McGovern v. EEOC, 28 M.S.P.R. 689, 691 n.1 (1985)* (same, but when predecessor to § 1614.310(h) was in effect). In other scenarios, an employee may elect either an appeal to the Board of the removal or a district court action for discrimination. See *5*

U.S.C. § 7702(e)(1)(A) (employee may appeal to the Board or file a district court action for discrimination, but not both, if an agency has not issued a final decision on a mixed case complaint within 120 days of the date the complaint was filed); 29 C.F.R. § § 1614.302(d)(1)(i), 1614.310(g) (same); see also *Connor v. United States Postal Serv., 15 F.3d 1063, 1065-66 (Fed. Cir. 1994)* (same, but under 29 C.F.R. § 1613.405(e)(2)(ii) (1988), the predecessor to § 1614.302(d)(1)(i)). But although it may seem anomalous, the statutes and regulations provide no scenario in which an employee may file a mixed case appeal with the Board after filing a district court action for discrimination. After the initial appeal of her removal was dismissed without prejudice, Ms. Leahy had a choice, as did the employee in Connor, of again filing an appeal of the removal with the Board or filing a discrimination action in district court. She chose the latter, thereby foreclosing a later appeal with the Board. Accordingly, the Board did not have jurisdiction over her refiled appeal.

Footnotes

[1] A mixed case appeal alleges that an agency action appealable to the Board was effected, in whole or in part, because of employment discrimination. 29 C.F.R. § 1614.302(a). Unless otherwise specified, citations to the United States Code (U.S.C.) and to the Code of Federal Regulations (C.F.R.) are to those in effect at the relevant time.

DOCKET NUMBER AT-0752-98-0126-I-2

MERIT SYSTEMS PROTECTION BOARD

KATHLEEN A. LEAHY,
Appellant,

v.

DEPARTMENT OF THE ARMY, Agency

January 19, 1999

David L. Ross, Esquire, Beverly Hills, California, for the appellant.

Captain Patrick N. Leduc, Esquire, Fort Stewart, Georgia, for the agency.

OPINIONBY: TAYLOR

OPINION:

BEFORE

Ben L. Erdreich, Chairman

Beth S. Slavet, Vice Chair

Susanne T. Marshall, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on August 10, 1998, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See 5 U.S.C. § 7703*(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See 5 U.S.C. § 7703*(b)(1).

Robert E. Taylor

Clerk of the Board

DOCKET NUMBER AT-0752-98-0126-I-2

MERIT SYSTEMS PROTECTION BOARD

KATHLEEN A. LEAHY,
Appellant,

v.

DEPARTMENT OF THE ARMY, Agency

David L. Ross, Esquire, Los Angeles, California, for the appellant.

Terry G. Peters, Esquire, and CPT Patrick N. Leduc, Esquire, Fort Stewart, Georgia, for the agency.

BEFORE

Lynn P. Yovino
Administrative Judge

INITIAL DECISION

On May 1, 1998, the appellant timely re-filed her appeal from her removal from the position of Protocol Specialist, GS-1 I, Fort Stewart, Georgia, effective October 7, 1997. The appellant had initially filed an appeal of her removal on November 7, 1997, but it was dismissed without prejudice. *See Leahy v. Department of the Army*, MSPB Docket No. AT-0752-98-0126-I-1 (Initial Decision, Feb. 3, 1998).

Because there is no factual dispute regarding the jurisdictional issue, the appellant's request for a hearing was

not granted. *See Manning v. Merit Systems Protection Board,* 742 F.2d 1424, 1428 (Fed. Cir. 1984). For the reasons below, the appeal is DISMISSED for lack of jurisdiction.

JURISDICTION

The Board's jurisdiction is not plenary because it is limited to those areas specifically granted by law, rule, or regulation. *5* U.S.C. § 7701(a); *Cowan v. United States,* 710 F.2d 803, 805 (Fed. Cir. 1983). And, the appellant has the burden of proving by preponderant evidence that the action she seeks to appeal is within the Board's jurisdiction. *5* C.F.R. § 1201 *.56(a)(2)(i).*

In its prehearing submission after the appeal was refi led, the agency raised the issue of whether the Board has jurisdiction over the appeal in light of the fact that the appellant had, in the interim, filed a complaint concerning her removal in the United States District Court for the Southern District of Georgia. *See* Refiled Appeal File, Tab *5.* I conducted two telephonic conferences on this issue on July 8, 1998, and I canceled the previously scheduled prehearing conference and hearing. *Id.* at Tab 6. I afforded the parties an opportunity to brief the legal issues in this case, and both parties responded. *Id.* at Tabs 6-8. For the reasons below, I find that the Board does not have jurisdiction over the appellant's removal.

The following facts are undisputed. On November 7, 1997, the appellant initially filed an appeal of her removal to the Board. On February 3, 1998, after receipt of the appellant's late-filed request for discovery due to recent appointment of counsel, the Board dismissed the appeal without prejudice to allow the parties to complete discovery and prepare for hearing. The appellant was instructed that the appeal would have to be refiled no later than 90 calendar days from the date of this decision, but not sooner than 45 days from the date of this decision.

Prior to refiling the appeal with the Board, however, the appellant filed a complaint in district court under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act on March 23, 1998. In that civil action, the appellant sought review of her removal, as well as other matters which would not have been otherwise appealable to the Board and which had been the subject of an EEO complaint. That court filing was after the first date that the appellant could have refiled her appeal with the Board--which was March 20, 1998. Then, on May 1, 1998, the appellant refiled her appeal to the Board.

The right to judicial review of an administrative action involving discrimination allegations is contained in *5* U.S.C. § 7702(e)(1). Under section 7702(e)(l)(B), after 120 days following the filing of an appeal to the Board, the appellant may file a civil action under the Civil Rights Act of 1964 if there has not been a judicially reviewable action by the Board. There are similar provisions for EEO complaints pending with agencies or with the Equal Employment Opportunity Commission. *See 5* U.S.C. § 7702(e)(l)(A) and (C).

At the time that the appellant filed her complaint in district court, there was no matter pending before the Board. Because the appellant filed her complaint in district court prior to refiling her appeal with the Board, and because the appellant had the option of first refiling her appeal with the Board, the Board lacks subject matter jurisdiction over the mixed-ease appeal of her removal.[1] *See Connor v. U.S. Postal Service,* 15 F.3d 1063, 1065-66 (Fed. Cir. 1994); *Williams v. Equal Employment Opportunity Commission,* 75 M.S.P.R. 144 (1997). In *Connor,* the court held that the appellant removed the appeal from the Board's jurisdiction by electing to first file suit in district court. As the court noted in *Connor,* the appellant cannot simultaneously "litigat[e] the same case in the United States Courts and in the administrative process."

Id., citing Colon v. Chairman of Bd. of Directors of Fed. Deposit Ins. Corp., 723 F.Supp. 842, 844 (D.P.R. 1989).

Even if the appeal had not been dismissed without prejudice or if the appellant had filed the district court complaint after filing her appeal with the Board, I would find that the Board lacks jurisdiction over the appeal. I recognize that, in *McGovern v. Equal Employment Opportunity Commission*, 28 M.S.P.R. 689, 691 n.1 (1985), the Board held that it would not dismiss such an appeal for lack of jurisdiction. However, for the reasons below, I find that the reasoning behind the Board's decision in *McGovern* is no longer valid.

In *McGovern*, the appellant had not received a judicially reviewable final decision from the Board within 120 days of the filing of the appeal at the time that he filed suit in district court under 5 U.S.C. § 7702(e)(l)(B). The Board noted that, under those circumstances, there was no statute either requiring or prohibiting the Board from going forward with its adjudication of the appellant's appeal. The Board declined to dismiss the pending petition for review, thereby rejecting the agency's argument that the decision to defer adjudication of this case to the district court was a matter of "administrative discretion." The Board reasoned that, by so deferring, it would, in effect, abdicate to the district court the duties and responsibilities the Board was legislated to perform. The Board held that section 7702(e)(1)(B) provided the appellant with an alternative and additional route of appeal of his discrimination claims, and the Board maintained jurisdiction over the appeal notwithstanding the simultaneous district court litigation.

At the time that the Board issued its decision in *McGovern*, EEOC's regulations were consistent with the Board's holding in that case. In then section 29 C.F.R. § 1613.283 (1985), the EEOC provided that "[t}he filing of a civil action by an employee or applicant does not terminate agency processing

of a complaint or Commission processing of an appeal under this subpart." However, that regulation was changed effective October 30, 1987, to reflect that the filing of such a civil action does terminate the agency's and EEOC's processing of an EEO complaint. *See* 29 C.F.R. §§1613.283 (1998) (race, color, religion, sex or national origin discrimination); *see also* 29 C.F.R. § 1613.513 (1998) (age discrimination complaints), and § 1613.215(a)(3) (1988) (agency processing of EEO complaint).

The current regulations are substantively identical to those codified in 1988. *See* 29 C.F.R. §§ 1614.107(c) and 1614.410.[2] Thus, these regulations demonstrate EEOC's practice of ceasing its processing of a complaint when a complainant elects to file a district court suit prior to a judicially reviewable action pursuant to *5* U.S.C. § 7702(e)(1)(A) and (C). In my view, for purposes of consistency of processing concerning issues of discrimination law, the Board should follow EEOC's practice and similarly defer adjudication to the district court when an appellant elects to file a district court suit pursuant to *5* U.S.C. § 7702(e)(1)(B).

In *Currier v. U.S. Postal Service,* MSPB Docket No. DC-0351-95-0631-B-1 (July 29, 1998), the Board reversed its previous holdings that an administrative judge could dismiss a frivolous allegation of discrimination prior to a hearing. The Board relied, in part, on the EEOC's finding that, as a matter of discrimination law, it is error for an administrative judge to dismiss such an allegation prior to a hearing. Thus, because EEOC's position regarding prehearing processing of an EEO allegation is "a matter of discrimination law" that the Board is bound to follow, I find that EEOC's practice in terminating complaints where an employee subsequently chooses to file a district court suit is a practice the Board is similarly compelled to follow.

In addition, the Board has, indeed, deferred to a federal court's consideration of an appellant's allegations concerning the adequacy of the agency's accommodation of his medical condition. In *Key v. U.S. Postal Service*, 31 M.S.P.R. 197 (1986), the Board specifically rejected the appellant's claim that the Board lacked statutory authority to defer to a federal court. The Board recognized that it is well settled that the Board is a quasi-judicial body and that the concerns of judicial administration "to prevent redundant and unnecessary litigation" are appropriate for consideration by the Board. *Key*, 31 M.S.P.R. at 199. Those concerns reflect the belief that simultaneous adjudications by two different district courts on the same issue would result in duplication of judicial effort. *Key*, 31 M.S.P.R. at 200. Therefore, the Board held that litigation of the identical issues before both the district court and the Board would needlessly complicate and encumber the process of both bodies and that, therefore, the Board abstained and deferred to the District Court's ruling on the accommodation issue.

Accordingly, I find that the appellant has not proven that the Board has jurisdiction over this appeal.[3]

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Linda P. Yovino
Administrative Judge

[1]Although the appellant argues that the dismissal of the appeal without prejudice was done solely for the benefit of the Board, the record reflects that her discovery requests were untimely filed due to late retention of counsel and could have been denied on that basis. Thus, the dismissal of the appeal without prejudice resulted in a benefit to the appellant by allowing her time to fully complete prehearing preparation. In any event, the purpose of the dismissal of the appeal

without prejudice is not relevant to the issue in this case, which is whether the appellant has the right to pursue a civil action in district court with a trial *de novo*, while also pursuing a subsequent filed administrative action before the Board concerning the same matter--her removal. In my view, when the appellant elected to first file with the court, she chose to remove the matter from the Board's jurisdiction. The appellant's argument that *Williams v. Equal Employment Opportunity Commission*, *75* M.S.P.R.144 (1997), suggests that the agency should seek a stay of the district court proceedings is unpersuasive. In *Williams*, the Board noted that the district court had stayed its proceedings, not that the agency was required to seek a stay. While that is an option available to the agency, it is not one that the agency is required to take. In fact, the appellant could have requested the district court to stay its proceedings, but instead has chosen to attempt to go forward with evidentiary hearings in both form on the same removal action.

[2] Indeed, 29 C.F.R. § 16 14.410 provides that "[i]f private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing."

[3]The parties were invited to address the issue whether, if the appellant were to withdraw her affirmative defenses and proceed solely on the merits and penalty issue in her removal appeal to the Board, the Board should go forward on those issues. *See* Refiled Appeal File, Tab 6. The appellant's response indicated that precedent appeared to hold that the appellant's claims cannot be bifurcated and presented in simultaneous proceedings. *Id.* at Tab 8. I agree. *See Gomez v. Department of the Air Force*, 869 F.2d 852 (5th Cir. 1989) (courts have refused to countenance severance of claims in mixed cases). In fact, the case law suggests that, if the appellant were to do so, the court would not have jurisdiction over her discrimination claims. *See McAdams v. Reno*, 64 F.3d 1137, 1140-44 (8th Cir. 1995) (if appellant abandons

EEO claims in Board proceeding, district court lacks jurisdiction to consider them).

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on SEP 1 4 , unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Kathleen A. Leahy
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Agency's Representative (s)

Terry G. Peters
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Other

Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

August 10, 1998
(Date) Barbara Walton-Mapp I)
Legal Assistant

29 C.F.R. Sec. 1614.302(a)

(a) Definitions--(1) Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems rotection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

U.S.C. Sec. 7702(e)(1)(A)(B)(C)
(e)(1) Notwithstanding any other provision of law, if at any time after -

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;